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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1278

CLARK COUNTY, NEVADA,
Petitioner,

vs.

ARBY W. ALPER AND RUTH ALPER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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I.

STATEMENT OF THE CASE

This is an action for inverse condemnation brought by Respondents, ARBY W. and RUTH ALPER (herein "ALPER") against Petitioner, Clark County, Nevada. The District Court dismissed the action *sua sponte* on the eve of the trial on the ground that Alper's failure to file a claim against the County under the Nevada Claims Statutes, N.R.S. 244.245 and 244.250, precluded suit. The Nevada Supreme Court reversed and remanded for trial on the merits on the ground that the claims statutes should not be construed to apply to actions for inverse condemna-

tion, since to do so would be to impose an unconstitutional impairment upon a right protected under the Fifth Amendment, applicable to the States under the Fourteenth Amendment.

Clark County filed a Petition for Rehearing (Appendix D). Alper responded with an Answer to Petition for Rehearing (Appendix I). The Nevada Supreme Court denied rehearing without opinion (Appendix C). Petitioner seeks review on certiorari of certain language in the opinion of the Nevada Supreme Court which Petitioner claims will deprive it of defenses at the trial through operation of the doctrine of "law of the case".

With the exceptions hereinafter noted, the facts are substantially as set forth in Petitioner's Statement of the Case. However, to place them in proper perspective, we would add the following:

1. The land for the taking of which Alper seeks just compensation is a strip 50′ x 1000′ at the intersection of Flamingo Road and Las Vegas Boulevard, South, one of the busiest corners on the so-called "Las Vegas Strip". By virtue of the taking, the entire 50′ x 1000′ parcel is now part of Flamingo Road, lying immediately in front of the M.G.M. Grand Hotel.

2. Although this land is now part of a public thoroughfare, Alper is still the record owner in fee.

3. Clark County took the land under color of a 52 year easement from Alper's lessee, Bonanza No. 1, knowing that Alper, as owner, was unwilling to dedicate the land to the County.

4. In 1967, when the 52 year easement was so given by the Lessee, the lease had only some five (5) years to

run, but was subject to a 50 year renewal option. The option was never exercised, and in 1969, the lease was cancelled by mutual consent. So the easement under which the County claims some color of right no longer exists.

5. From the time of the taking, Alper, has been completely deprived of the use of any part of his property.

6. Clark County has at no time either compensated, or offered to compensate, Alper for the land so taken.

7. Furthermore, to this very day, Clark County has continued to levy and collect, and Alper has continued to pay, real property taxes upon the full fee value of the land.

8. By its letter dated June 19, 1968, the County recognized Alper's ownership of the fee and stated that "the County will not contend that because of the continued use of the property as a thoroughfare that any prescriptive right to a street easement can be obtained." (Appendix G).

9. Before ruling that the action was barred by the claims statutes, N.R.S. 244.245 and 244.250, the District Court itself recognized that anomalous position in which the County had placed itself, in the following language:

> "THE COURT: Assuming that I was to agree with you, and that the condition precedent to suit applied and that this plaintiff could not continue to pursue this lawsuit, wouldn't we be left in limbo the plaintiff owning bare, naked title, you're still assessing him taxes on it; yet he couldn't sue to recover just compensation for the property taken and you couldn't adversely possess it? What a horrible result. . . ." (Record on Appeal 2546-2547).

II.

HOLDING OF NEVADA SUPREME COURT

In reversing the Judgment of Dismissal and remanding the action for trial on the merits, the Supreme Court of Nevada said:

> "In the instant case it is clear that, if applied to actions of inverse condemnation, N.R.S. 244.245 and 244.250 would be conditions on the right to sue. The Fifth Amendment to the United States Constitution states that private property shall not be taken for public use without payment of just compensation. A suit for inverse condemnation is an action to vindicate the right created and guaranteed by the Fifth Amendment and is applicable to the states by way of the Fourteenth Amendment. To impose a requirement of compliance with our claims statutes would allow a state to impose a pre-condition to sue on a federally created and protected right. The imposition of such a prerequisite to sue is an impairment of a Federal right not countenanced by the ruling of the Ninth Circuit in *Willis*. Consequently, if we were to assume in the case at hand that the claims statutes were intended to cover actions for inverse condemnation, such applications would, in our opinion, be unconstitutional
>
> "Therefore, we hold that the claims statutes should not be construed to apply to actions for inverse condemnation, for to do so would deny due process of a constitutionally guaranteed right." (A8-A9).

III.

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED ON CERTIORARI

A.

Petitioner Is Not Adversely Affected by the State Supreme Court's Decision Since Statements of Fact and Law Contained Therein, Which Were Not Actually Adjudicated, Are Set at Large Upon Remand for Trial on the Merits and Do Not Bind the Parties As the Law of the Case. Consequently, the Petition for a Writ Is Frivolous and Raises No Substantial Federal Question.

The Petition for Certiorari does not attack the principal holding of the Nevada Supreme Court—as quoted above. So, irrespective of what disposition is made of the Petition, it would appear that trial will proceed on the merits to determine what "just compensation" should be paid to ALPER for the taking of his property for public use by CLARK COUNTY. The judgment of the District Court after such trial will again be subject to appeal to the Nevada Supreme Court upon questions of State and Federal law, and, ultimately, to this Honorable Court upon any Federal questions which may be raised and preserved at the trial and appellate level in Nevada.

The Petition for Certiorari addresses itself only to certain collateral "comments, statements, and conclusions" in the Nevada Supreme Court's opinion which Petitioner itself characterizes as "apparent findings of fact-law issues not before the Court on appeal" (page 5 of Petition for Certiorari). Petitioner apprehends that such language in the opinion of the appellate court *may* deprive Petitioner of *possible* defenses at the trial on the merits through operation of the doctrine of "law of the case."

These apprehensions are premature and misconceived, and do not rise to the substantiality required to evoke the discretionary jurisdiction of this Honorable Court upon Certiorari.

In the first place, it is universally held that questions of law not actually adjudicated by the appellate court, either directly or by implication, do not become the "law of the case", even though the appellate court may have made some statements or remarks with respect thereto by way of dictum. *Barney* v. *Winona & St. Peter Ry. Co.*, 117 U.S. 228, 6 S.Ct. 654, 29 L.Ed. 858; *Wm. J. and M. S. Vesey, Inc.* v. *Hillman*, (1972 Ind.) 280 N.E.2d 88, 93; *O'Brien* v. *Great Northern Rd. Co.*, (1966 Mont.) 421 P.2d 710, cert. den. 387 U.S. 920, 18 L.Ed.2d 974, 87 S.Ct. 2034; *Fort Wayne Nat'l Bank* v. *Doctor*, (1871 Ind.) 272 N.E.2d 876; *Webster* v. *Williams*, (1937 S.C.) 194 S.E. 330, 331; *Bryson* v. *Crown Oil Co.*, (1916 Ind.) 112 N.E. 1, 2; *Bates* v. *Smith*, (1966 Cal. App. 5th) 54 Cal. Rptr. 624, 627; *Steelduct Co.* v. *Henger-Seltzer Co.*, (1945 Cal.) 26 Cal. App. 2d 634, 160 P.2d 804, 809; *Moore* v. *Trott*, (1912) 162 Cal. 268, 122 P. 462, 464; 5B C.J.S. 557, Appeal and Error, §1964 (c).

So, in *Barney* v. *Winona & St. Peter Ry., Co.*, supra, this Honorable Court said:

> "We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The decision is the law of the case, and must control its disposition; *but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision.*" (Emphasis supplied).

And, in *O'Brien* v. *Great Northern Rd. Co.*, supra, as the Montana Supreme Court aptly observed:

> "The application of the doctrine of 'the law of the case' is limited to those issues which were actually decided and were necessary to the decision. The doctrine does not extend so far as to include matter which was consequential, incidental, or not decided by the Court."

In the Indiana case of *Wm. J. and M. S. Vesey, Inc.*, supra, where, as here, the first appeal was decided before trial on the merits, the Court said:

> "In view of the fact that the first appeal transpired prior to a trial on the merits of this case, we are of the opinion Vesey puts too much of a strain upon what constitutes 'the law of the case'. . . . Only those points decided in the first opinion become the law of the case."

In the second place, the doctrine of law of the case applies only to principles of law laid down by the Court as related to a retrial of the facts, but does not embrace the facts themselves. *Muktarian* v. *Barnby*, (1968 Cal. D.C.A. 5th) 70 Cal. Rptr. 903, 905; *Arkansas State Highway Commission* v. *Lemley*, (1973 Ark.) 497 S.W.2d 680; *Ziolkowski* v. *Cont. Casualty Co.*, (1937 Ill.) 7 N.E.2d 451, 454. So, in *Lemley*, supra, quoting from 5 Am. Jur. 2d §755, the Court said:

> ". . . a decision on appeal on a question of fact does not generally become the law of the case, nor estop the parties on a second trial from showing the true state of facts."

Finally, where, as here, the reversal remands the case for a new trial without specific directions, all issues involved in the case are set at large for readjudication at the new trial, the parties being restored to the same position as though the case had never previously been tried. *People* v. *Lagiss*, (1964 Cal. D.C.A. 1st) 35 Cal. Rptr. 554, 567-568; *Daly* v. *Smith*, (1963 Cal. App.) 220 Cal. App. 2d 592, 33 Cal. Rptr. 920, 925; *Choate* v. *Dept. of Public Health & Welfare*, (1956 C.A. Mo.) 296 S.W.2d 189, 194; *Ziolkowski*, supra. So, neither the "findings of fact and conclusions of law" made by the District Court to memorialize its pre-trial conference rulings on questions of law and fact, nor any facts "found" by the Nevada Supreme Court as the predicate for its decision, would be binding at the trial on the merits.

Consequently, at trial neither party will be bound by the Supreme Court's statement that the trial court had determined "as a matter of law" that the Alper property was "taken" by Clark County in May, 1967, when it entered the Alper land pursuant to the 52 year easement. The County is, therefore, in no way prejudiced by such non-adjudicative statement and, if the same is relevant, will have the opportunity of presenting evidence as to the circumstances surrounding the granting of the easement, and to argue the legal effect of the easement and of the lease termination. Similarly, at trial neither party will be bound by the appellate court's statement that the present action was filed by ALPER on July 31, 1972.[1]

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1. The record will show that this action was actually commenced on May 22, 1970; that Alper was added as a party by Stipulation and Order on May 5, 1971; and that the original plaintiff was dismissed on Stipulation thereafter. Alper filed his Amended and Supplemental Complaint on July 31, 1972.

B.

The Adjudication of the Nevada Supreme Court That Alper Is Not Precluded From Recovering Just Compensation by Any Applicable Statute of Limitations, Is Properly the Law of the Case.

The holding of the Nevada Supreme Court that Alper is not precluded from recovering just compensation by any applicable Statute of Limitations, because there was an "avoidance" of the statute through the County's letter of June 19, 1968 (Appendix G), stands on a different footing.

The question of whether Alper is barred by either N.R.S. 11.190(5)(b) or N.R.S. 11.220 (Appendix J) was tendered to the Nevada Supreme Court by Clark County as an additional ground why the District Court's Judgment of Dismissal should be upheld. This was done by Clark County over Alper's objection that the Statute of Limitations had not been pleaded and could not be raised for the first time on appeal, especially when the County had not cross-appealed. The entire question as to whether any Statute of Limitations is applicable in Nevada to a claim for inverse condemnation or whether such claim can be extinguished only through an adverse holding by the condemnor for the 5 year holding period required by Nevada law (accompanied by all the other incidents of adverse possession, such as hostile possession under claim of right and payment of taxes (N.R.S. 11.150, N.R.S. 11.160 Appendix K)), was fully briefed by Clark County (Appendix L) and by Alper (Appendix M).

Under these circumstances, it is clear that the Nevada Supreme Court accepted the issue so tendered by Clark County as a proper matter for consideration on appeal, and expressly adjudicated it. In the posture of the case,

such adjudication was presumably necessary because Alper could not be said to be aggrieved by the District Court's dismissal for failure to comply with the claims statutes, if Alper were barred in any event by operation of the Statute of Limitations, and so Alper's appeal would have been rendered moot.

The Supreme Court's cryptic statement that the "record shows an avoidance of the statute" because of the County's letter of June 19, 1968 promising not to assert any prescriptive rights in the property, may therefore be construed either as a holding that the County was estopped by its letter from asserting the bar of the Statute of Limitations, since a prescriptive right is one which arises through operation of the Statute of Limitations, or, it may be construed as a holding that the Clark County's letter evidenced an intention not to claim adversely to Alper, so that the Statute of Limitations could never commence to run.

In either event, the Nevada Supreme Court's conclusion that "appellants are not now barred from proceeding in the instant case" is the law of the case, binding upon Clark County, and properly so, since the County itself tendered this issue to the Court on appeal, the County's letter was before the Court for Judicial interpretation, and the "avoidance" of the statute of limitations through the County's acts was actually and necessarily adjudicated.

In any event, the County is in no way aggrieved by the ruling. At the trial it may urge, as it seeks to urge on certiorari, that such ruling should not be regarded as the law of the case. Should the District Court's decision be adverse, the question may again be raised on appeal to the Nevada Supreme Court after trial. And nothing in the Fourteenth Amendment would preclude the Nevada

Supreme Court from "altering or correcting its interlocutory decision upon a first appeal when the same case, with the same parties, comes before it again." *Moss* v. *Ramey*, 239 U.S. 430, 60 L.Ed. 425, 431 (1915).

C.

The Final Judgment Rule Precludes Review on Certiorari.

28 U.S.C. §1257 limits review by the Supreme Court to "final judgments or decrees rendered by the highest Court of a state in which a decision could be had." The final judgment rule has been said to be the dominant rule in federal appellate practice. *Di Bella* v. *United States*, (1962) 369 U.S. 121, 126, 82 S.Ct. 654, 7 L.Ed.2d 614. It has been suggested that the final judgment rule precludes review "where anything further remains to be determined by a State Court, no matter how dissociated from the only Federal issue that has finally been adjudicated by the highest Court of the State." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124, 89 L.Ed. 2092, 65 S.Ct. 1475 (1945).

It is true that the decisions of this Court have long recognized exceptions to the final judgment rule. However these have generally been limited to such circumstances as were presented in *Forgay* v. *Conrad*, 6 How. 201, 12 L.Ed. 404 (1848), where the state Court judgment required the immediate delivery of property with only an accounting or other ministerial act left pending in the state Court; or where a collateral order, if not subjected to immediate review, would irretrievably destroy the rights of the party seeking the intervention of this Court, as in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). No such circumstances are presented here.

Cox Broadcasting Corp. v. *Cohn,* (1974) 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029, cited by Petitioner, is equally inapposite. For, unlike *Cox,* the Nevada Supreme Court's decision does not cloud "an important question of freedom of the press", nor threaten to "seriously erode federal policy", nor would "reversal of the State Court on the federal issue be preclusive of any further litigation on the relevant cause of action." On the contrary, as already noted, since the principal holding of the Nevada Supreme Court is not under attack, at most, a ruling of this Court reversing the declarations of the Nevada Supreme Court which Petitioner complains of, would merely control the nature and character of further proceedings in Nevada. It would not preclude them.

Moreover, as this Court noted in *Cox,* in most, if not all, of the categories of cases in which the Supreme Court has treated the State Court decision on the federal issue as a final judgment for purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting completion of the additional proceedings pending in the lower state courts, "these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date." For this very reason, this Court has steadfastly refused to depart from the final judgment rule in eminent domain proceedings, for, as this Court said in *Cox*:

> "Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal question with another federal question to be decided later, 'For in those cases the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. *A state judgment is not final unless it covers both aspects of that integral problem.*' *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.,* 414 U.S. 156, 163, 38 L.Ed.2d 379, 94 S.Ct. 407 (1973). See also *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U.S. 251, 256, 61 L.Ed. 702, 37 S.Ct. 295 (1917); *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 127, 89 L.Ed. 2092 (1945)." (Emphasis supplied) (43 L.Ed.2d 328, 339).

It is fundamental, of course, that an "inverse condemnation" action is an eminent domain proceeding in reverse where the property owner is obliged to sue for "just compensation" because the public condemnor has defaulted in its constitutional duty. Consequently, a state court judgment in an inverse condemnation action has no finality until both the right of the condemnor to "take for public use" and the "just compensation" to be paid the owner, have been adjudicated. In the case at bar, the Nevada Supreme Court's decision has remanded the cause to the trial Court without instructions, and it is there pending on both issues. Such a judgment is not final and certiorari from such non-final judgment will not lie. The controlling authority is not *Cox,* supra, but *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U.S. 251, 256, 61 L.Ed. 702, 37 S.Ct. 295 (1917) and *Catlin* v. *United States,* 324 U.S. 229, 89 L.Ed. 911, 65 S.Ct. 631 (1945). So, in *Catlin,* supra, this Court said:

> ". . . ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here. The rule applies to review by this Court of judgments of state courts, in advance of determination of just compensation, although by local statute 'judgments of con-

demnation,' i.e., of the right to condemn particular property, are reviewable before compensation is found and awarded. *Wick* v. *Superior Court*, 278 U.S. 574, 49 S.Ct. 94, 73 L.Ed. 515; Id., 278 U.S. 575, 49 S.Ct. 94, 73 L.Ed. 515; *Public Service Co. of Indiana* v. *City of Lebanon*, 305 U.S. 558, 59 S.Ct. 84, 83 L.Ed. 352; Id., 305 U.S. 671, 59 S.Ct. 143, 83 L.Ed. 435; cf. *Dieckmann* v. *United States*, 7 Cir., 88 F.2d 902. The foundation of this policy is not in merely technical conceptions of 'finality'. It is one against piecemeal litigation. 'The case is not to be sent up in fragments * * *.' *Luxton* v. *North River Bridge Co.*, 147 U.S. 337, 341, 13 S.Ct. 356, 358, 37 L.Ed. 194. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals."

Nor is there any legal basis for Clark County's apprehensions that, if denied immediate review by the Court on certiorari, it will be concluded by the Nevada Supreme Court's declarations as the "law of the case." For, as this Court said in *Grays Harbor*, supra:

> "When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the Federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the Supreme Court (82 Wash. 503), as laying down the law of the case, *this court will not be thus bound.*" (Emphasis supplied) (37 S.Ct. 295, at 297).

D.

As a Political Subdivision of the State of Nevada, Clark County Is Not a "Person" Within the Protection of the "Due Process" Clause of the Fifth Amendment.

It has been a rule of almost universal application that neither a state (*South Carolina* v. *Katzenbach*, (1966) 383 U.S. 301, 15 L.Ed.2d 769, 86 S.Ct. 803) nor any political subdivisions of a state (*Williams* v. *Eggleston*, (1898) 170 U.S. 304, 18 S.Ct. 617, 619), such as counties or municipalities or municipal corporations, may be regarded as a "person" within the protection of the "due process" clauses of the Federal or State Constitutions. *Warren County* v. *Hester*, (1951) 219 La. 763, 54 So.2d 12, 18; *Bibb County* v. *Hancock*, (1955) 211 Ga. 429, 86 S.E.2d 511; *Shelby* v. *City of Pensacola*, (1933 Fla.) 151 So. 53; *State ex rel. List* v. *County of Douglas*, (1974) 90 Nev. 272, 279, 524 P.2d 1271; *Minnesota State Board of Health* v. *Brainerd*, (1976 Minn.) 241 N.W.2d 624, 633-634; *City of Mountlake Terrace* v. *Wilson*, (1976) 15 Wash. App. 392, 549 P.2d 497, 498 (and cases cited); see also *William* v. *Baltimore*, (1933) 289 U.S. 36 and *Trenton* v. *New Jersey*, (1923) 202 U.S. 182.

In *South Carolina* v. *Katzenbach*, supra, this Court said:

> "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any Court."

Notwithstanding this authority, Petitioner argues that because of the recent erosion of the doctrine of "sovereign immunity" both by judicial and legislative action, and the consequent greater exposure of political subdivisions

to suit, such entities should, in fairness, be accorded procedural due process. If this be so, we respectfully suggest that Petitioner has selected a flimsy vehicle to carry the suggested doctrine before this Court. This is so for two reasons:

First, a suit for inverse condemnation is based upon Constitutional right rather than upon waiver of the doctrine of "Sovereign immunity". Public bodies which fail in their Constitutionally mandated duty to see to the payment of "just compensation" for property taken by them for public use have always been subject to suit by virtue of self-executing provisions of the Constitution. *Rose* v. *State,* (1942 Cal.) 123 P.2d 505, 513. Their exposure to suit has therefore not been increased by the erosion of the "sovereign immunity" doctrine.

Second, it is apparent from what has been said earlier in this brief that Petitioner does not have standing to raise the issue because it has not even colorably been deprived of procedural "due process" by anything contained in the decision of the Nevada Supreme Court or in the denial of its Petition for Rehearing. Since Petitioner has not been denied "due process" under the non-final judgment of the Nevada Supreme Court, and will have ample opportunity for review of any future denial of "due process" in the state trial and appellate court proceedings to follow, as well as by ultimate appeal to the Supreme Court of the United States, the issue is not yet ripe for adjudication.

The minority decisions cited by Petitioner in support of its position that political subdivisions are entitled to "due process" are not persuasive. In *Township of Middletown* v. *Institution District,* (Pa. Commonwealth) 203 A.2d 885, while the court stated that municipal subdivisions are entitled to procedural due process, the language was

clearly dicta, since the court found that the complaining township had had notice and an opportunity to be heard. In *Mensik* v. *Smith,* (1960 Illinois) 18 Ill. 2d 572, 166 N.E.2d 265, 274, it was said that governmental bodies or state agencies are entitled to constitutional guarantees of due process only when their property rights are involved. However, since the court also found that the defendants, as State officers, had no property interest in the matter complained of, this language was also dicta. In *Township of River Vale* v. *Town of Orangetown,* (1968 2nd Cir.) 403 F.2d 684, the Court distinguished the many cases holding that a political subdivision of the State cannot assert rights under the "due process" clause as instances in which the public entity was challenging a law of its own state, and as stemming from the doctrine of *Williams* v. *Eggleston,* supra, that municipal corporations are subject to the control of the legislatures which created them and cannot invoke the constitutional guaranty against the will of their creators. However, we respectfully suggest that since judicial action by the highest court of a state is as much the act of a state as is the action of its legislature, *Shelley* v. *Kraemer,* (1947) 334 U.S. 1, 92 L.Ed. 1161, 1181, the distinction made in *Township of River Vale,* supra, is inapposite. Clark County is no more entitled to invoke "due process" against the judgment of the Supreme Court of Nevada than it would be to invoke the constitutional protection against an Act of the Legislature changing its boundaries.

CONCLUSION

Petitioner has not been denied due process of law by the Nevada Supreme Court's decision, since any expressions on legal issues contained in its opinion not actually

and necessarily decided are not the "law of the case" and will not bind the parties in future proceedings below, and since any facts recited in its opinion remain open to readjudication at the trial. Since Petitioner has not even colorably been denied "due process", it has no standing to raise the contention that, as a political subdivision of the state, it is a "person" entitled to "due process" under the Federal Constitution. Furthermore, Petitioner is precluded by the final-judgment rule from seeking review in the Supreme Court before it has exhausted its trial and appellate remedies in the State Courts.

While Clark County has not been deprived of Constitutional rights, by raising frivolous and unsubstantial issues in its petition for certiorari which cannot under any circumstances be dispositive of the ultimate Federal questions of "taking" and "just compensation" in this inverse condemnation action, Clark County is merely delaying the "due process" and "just compensation" which Alper has been seeking ever since his property was taken for public use in 1967.

The County has not shown the existence of a single ground for issuance of certiorari set forth in Rule 19 of the Rules of the Supreme Court. Its Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX I

IN THE
SUPREME COURT OF THE STATE OF NEVADA

No. 8412

ARBY W. ALPER and RUTH ALPER,
Appellants,
vs.
CLARK COUNTY, NEVADA,
Respondent.

ANSWER TO PETITION FOR REHEARING

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ANSWER TO PETITION FOR REHEARING

In its Petition for Rehearing, Petitioner, CLARK COUNTY, has not shown itself to be entitled to rehearing upon any of the narrow grounds defined in Rule 40 of the Nevada Rules of Appellate Procedure.

A.

The first five (5) pages of the Petition focus upon the fact that although there was no evidentiary hearing below and the District Court ruled *sua sponte* (albeit, as this Honorable Court has found, erroneously), that it had no jurisdiction to hear this cause because of failure of Appellants to file a claim under *NRS 244.245*, the District Court nevertheless made certain rulings in the form of Findings of Fact and Conclusions of Law (R/A 2680-2685) summarizing its pre-trial conference rulings.

If we understand its argument correctly, the COUNTY claims that some of these preliminary determinations found their way into the statement of facts contained in the briefs of *both* parties (Petition for Rehearing, pg 4, 1.20-25) and "*may have* contributed to this Honorable Court's misapprehending of the limitations of the scope of the issue for appeal". (Ibid., emphasis supplied) The COUNTY also apprehends that some of the facts recited in the Opinion of this Honorable Court, presumably based upon the recitals in the briefs and in the lower court's findings, may become the "law of the case" when this cause is tried upon its merits.

There is no merit in these contentions.

First, the COUNTY has failed to show how, or in what respect, this Honorable Court has misapprehended or exceeded the scope of the issue on appeal, or how the District

Court's Findings (R/A 2680-2685) contributed to such result. The COUNTY itself defines the issue on appeal as "whether or not NRS 244.245 applies to an action for inverse condemnation". (Petition for Rehearing, pg 3, 1.21-22) The Opinion shows that this Honorable Court addressed itself to this precise issue, stating:

> "the principal issue presented is whether NRS 244.245 and NRS 244.250, the Six Months' Claims Statutes, apply to a claim for damages in an inverse condemnation proceeding brought by a property owner against a county."

Responding to this issue, the Opinion holds:

> "if we were to assume in the case at hand that the claims statutes were intended to cover actions for inverse condemnation, such application would, in our opinion, be unconstitutional.
>
> "Therefore, we hold that the claims statutes should not be construed to apply to actions for inverse condemnation for to do so would deny due process of a constitutionally guaranteed right." (Opinion, pg 6)

Having concluded that the claims statutes do not apply to inverse condemnation claims *at all*, the court found it unnecessary to address itself to the further question, extensively briefed, as to whether the claims statutes *if so applied* would be a denial of equal protection of the laws under its prior decision in *Turner* v. *Staggs* (1973) 89 Nev. 230; 510 P.2d 879, or under such cases as *Tamulion* v. *Michigan State Waterways Commission* (1973 Mich. App.) 212 N.W.2d 828, and *Hunter* v. *North Mason High School* (1975 Wash.) 539 P.2d 845.

Second, Appellants' statement of the fact (fully referenced to the record) was presented at pages 2 to 14 of

Appellants' Opening Brief. Though the COUNTY criticized Appellants' Statement of Facts in general terms, at pages 2 to 7 of its Answering Brief, it restated the facts (without benefit of references to the record) substantially as stated at pages 2 to 14 of Appellants' Opening Brief. Since the parties were in substantial agreement as to the facts, it is not apparent how the court could have been misled by their recital.

Third, there is obviously no merit in the COUNTY's contention that since the District Court found itself to be without jurisdiction and dismissed the action on that ground, it had no authority to make its pre-trial conference rulings. For this Honorable Court has decided that, because the claims statutes are not applicable, and were never applicable, to claims in inverse condemnation, the District Court *did* have jurisdiction of this cause.

Fourth, moreover, the COUNTY's attack on the District Court's pre-trial conference rulings comes both too late, and too early, and provides no basis for rehearing. It is too late, because the point is raised for the first time on rehearing in violation of *Rule 40(c)(1) N.R.A.P.* It is too early because the issue as to the binding effect of the District Court's pre-trial conference rulings can be raised before the District Court when this cause has been remanded for trial on the merits. It provides no basis for rehearing because this Honorable Court did address itself to, and adjudicate, the only part of the District Court's "findings of fact and conclusions of law" which were brought before it on appeal, namely, Conclusions of Law 13, 14, 15, and 16.[1] The remaining portions of the Dis-

1. "13. That NRS 244.245 is constitutional as applied to inverse condemnation actions.

"14. That plaintiffs ALPER did not comply with NRS 244.-245.

(Continued on following page)

trict Court's pre-trial conference rulings, both those which the District Court purported to find as a matter of fact and those which it purported to find as a matter of law, were intended to regulate the trial on the merits, the court having made such rulings before it arrived at its ultimate decision dismissing the action for supposed want of jurisdiction. They were not involved in the issues presented to this Honorable Court on appeal and cannot be said to have been adjudicated in its decision.

Fifth, since this Honorable Court, though it may have referred to some of the "facts" established by the District Court rulings, did not purport to adjudicate them, there is no basis for the COUNTY's apprehensions that such unadjudicated "facts" will become the "law of the case". This is so for two reasons.

1) The doctrine of "law of the case" has been said to apply only to determinations of questions of law and not to questions of fact. Therefore, the doctrine does not estop the parties to a second trial from showing the true state of facts. *5 Am. Jur.2d 198, Appeal & Error, Sec. 755.*

2) The doctrine of "law of the case" applies only to matters actually adjudicated by the appellate court. Thus, it is said in *5B C.J.S. 557, Appeal & Error, Sec. 1964(c)*:

> "Matters which were not decided by the appellate court, directly or by implication, are

Footnote continued—

"15. That NRS 244.245 is a condition precedent to filing suit and is a jurisdictional defect in this proceeding.

"16. That the letter dated June 19, 1968 from James M. Bartley, Chief Civil Deputy District Attorney to R.B. Alper does not create an estoppel against defendant COUNTY OF CLARK to assert 244.245." (R/A 2684-2685)

> not within the operation of the rule that the decision of an appellate court is the law of the case in subsequent proceedings in the same cause; and this is so even though the appellate court may have made some statements or remarks with respect thereto."

Sixth, in view of the above considerations, it can hardly be said—within the meaning of *Rule 40(c)(2)(ii)*—that substantial justice will be promoted by rehearing. Substantial justice does not require this Honorable Court to deal with matters which were not adjudicated in its Opinion. On the contrary, substantial justice requires a prompt remand to the District Court for trial on the merits so that Appellants may be awarded the just compensation guaranteed to them by the Federal and State Constitutions and which has so long eluded them.

B.

Without citing a single authority, the COUNTY next asserts that this Honorable Court has misapprehended the thrust of the effect of so-called "*self-executing* constitutional provisions". (Petition for Rehearing, pg 5, 1.15-26) The argument here is that while self-executing constitutional rights may not be totally abrogated, the manner of their exercise may be reasonably regulated as by statutes of limitation. However, this is merely a re-argument of matters already fully briefed and argued (see Respondent's ANSWERING BRIEF, page 26; and Appellants' REPLY BRIEF, pages 42-43), and therefore, provides no basis for rehearing. (*Rule 40(c)(1) N.R.A.P.*) Besides, the claims statutes are much more than mere statutes of limitations. As pointed out in *Willis* v. *Reddin* (9th Cir, 1969) 418 F.2d 702, cited by this Honorable Court in its Opinion:

> "They are elements of the plaintiff's cause of action and conditions precedent to the maintenance of the action."

C.

Nor is there any merit to the COUNTY's attempt to show that this Honorable Court has misapprehended or misapplied the holding of the Ninth Circuit in *Willis* v. *Reddin*. While it is true that *Willis* v. *Reddin* involved the question of the right to sue without compliance with a state claims statute in order to vindicate a right arising under the Federal Civil Rights Statutes, the principle there enunciated is not, as the COUNTY asserts, limited in scope to federal statutory right, in general, or personal rights arising under the federal civil rights statute, in particular. Thus, the United States District Court for the Eastern District of California in the unreported case of *The Albert Ellis Radinsky Foundation, Inc.* v. *County of Sierra*, Civil No. 8100 (attached as APPENDIX "H" to Appellants' OPENING BRIEF) applied the principles of *Willis* v. *Reddin* in refusing to permit the California claims statute to bar a suit for inverse condemnation, upon the ground that such a suit is:

> "an action to vindicate the right created and guaranteed by the Fifth Amendment, and applicable to the states by way of the Fourteenth Amendment."

See also:

> *Chicago, B & Q R.R.* v. *City of Chicago* (1897) 166 U.S. 226; 41 L.ed. 979; 17 S.Ct. 581
>
> *Malloy* v. *Hogan* (1963) 378 U.S. 1; 12 L.ed.2d 653; 84 S.Ct. 1489

The correctness of this view can hardly be questioned, for if a state may not impose pre-conditions upon the right to

sue to vindicate a right created by federal statute, how much less may it impose a pre-condition on a right to sue under a right guaranteed by the Federal Constitution. Though not exactly in point, since a state statute was there involved, the observation of Mr. Justice Harlan, concurring in *Monroe* v. *Pape* (1961) 365 U.S. 167, 196; 81 S.Ct. 473, 488; 5 L.ed.2d 492, is nevertheless illuminating:

> ". . . a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."

Nor is there any substance to the COUNTY's contention that *Willis* is merely an illustration of *federal* judicial policy binding only upon *federal* courts. For, in its 1976 decision in *Williams* v. *Horvath*, 129 Cal.Rptr. 453; 548 P.2d 1125, the Supreme Court of California, citing *Willis* with approval, held that the California Claims Statute could not be applied to bar the right of a federal civil rights litigant to bring suit *in the state courts* of California for vindication of the federally given right.

D.

Finally, the COUNTY claims that this Honorable Court misapprehended the circumstances and the effect of the COUNTY's June 19, 1968 letter in concluding that as a result of such letter there was an "avoidance" of the statutes of limitations. The COUNTY's contention that Alpers' claim is barred by the statute of limitations was fully briefed (Respondent's ANSWERING BRIEF, pages 25-28; and Appellants' REPLY BRIEF, pages 33-49), and for this reason is not a proper subject for re-argument on rehearing. (*Rule 40(c)(1) N.R.A.P.*) In any event, the COUNTY has not pointed out in what way this Honorable

Court misapprehended the effect of the letter. The COUNTY's June 19, 1968 letter being before the court is certainly a proper subject for judicial interpretation. And, in concluding that the statute of limitations was "avoided" by the letter, it appears to us that this Honorable Court was saying that the COUNTY is estopped by its letter (promising not to assert any prescriptive rights in the property) from asserting such rights by way of the statute of limitations, since a prescriptive right is one which arises through operation of the statute of limitations. Or, this Honorable Court was saying that since the COUNTY's letter renounces any *claim of right* to the property, the statute of limitations could never commence to run. Under either interpretation, it is evident that the correct result was reached and that the only misapprehension is one on the part of the COUNTY.

CONCLUSION

The COUNTY has failed to show any basis for rehearing. Its petition either seeks re-argument upon matters fully briefed and argued by the parties and by *amicus curiae*, or brings up new points raised for the first time on rehearing and not relevant to what was adjudicated by the court. Nor has there been a showing that the court has overlooked or misapprehended any material matter or that substantial justice requires a rehearing. (*Rule 40 N.R.A.P.*)

It is therefore respectfully submitted that the Petition for Rehearing should be denied.

Respectfully submitted,

/s/ George Rudiak
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APPENDIX J

Nevada Revised Statutes

11.190 Periods of limitations prescribed. Actions other than those for the recovery of real property, unless further limited by NRS 11.205 or by or pursuant to the Uniform Commercial Code, can only be commenced as follows:

. . .

5. Within 1 year:

. . .

(b) Actions or claims against a county, incorporated city, town or other political subdivision of the state which have been rejected by the board of county commissioners, city council or other governing body, as the case may be, after the first rejection thereof by such board, city council or other governing body, or the expiration of the time limited for failure to act by subsection 3 of NRS 41.036.

11.220 Action for relief not hereinbefore provided for. An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued.

APPENDIX K

Nevada Revised Statutes

11.150 Additional requirements for adverse possession: Occupation continuously for 5 years; payment of taxes. In no case shall adverse possession be considered established unless it be shown, in addition to the requirements of NRS 11.120 or 11.140, that the land has been occupied and claimed for the period of 5 years, continuously, and that the party or persons, their predecessors and grantors have paid all taxes, state, county and municipal, which may have been levied and assessed against the land for the period mentioned, or have tendered payment thereof.

11.160 Relation of landlord and tenant as affecting adverse possession. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord until the expiration of 5 years from the expiration of the tenancy, or, where there has been no written lease, until the expiration of 5 years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

APPENDIX L

Excerpt From Respondent's Answering Brief

(pages 25 to 28)

Case No. 8412

In the Supreme Court of the state of Nevada

Arby W. Alper and Ruth Alper, Appellants vs. Clark County, Nevada, Respondent

D. REGARDLESS OF WHETHER N.R.S. 244.245 IS APPLICABLE TO THE FACTS OF THIS CASE, N.R.S. 11.190(5)(b), THE ONE YEAR STATUTE OF LIMITATIONS DOES BAR THE MAINTENANCE OF PLAINTIFFS-APPELLANTS' ACTION.

Although claim statutes clearly stand alone on their own merits, they are likewise operable in conjunction with other applicable statutes of limitation. See *Rogers* v. *State*, 85 Nev. 361, at p. 365; 455 P.2d 172 (1969). NRS 11.190 (5)(b) allows one year within which to bring actions or claims against a county, or other political subdivision which have been rejected by the governing body, or after the expiration of time limited for failure to act under NRS 41.036.

The statute clearly covers "*all* actions or claims against the county." (Emphasis supplied) It does not differentiate types of claims or actions and it applies to the facts herein.

There is ample authority that statutes of limitation similar to NRS 11.190(5)(b) do, under proper facts, apply

to actions in inverse condemnation in California (see *Wilson* v. *Beville*, 306 P.2d 789 (1957)) and in many other jurisdictions: *Trippe* v. *Port of New York Authority*, 249 N.Y.S.2d 409 (Ct. App. 1964); *Arkansas State Highway Commission* v. *Montgomery*, 376 S.W.2d 662 (Ark. 1964); *Hot Springs County* v. *Fowler*, 320 S.W.2d 269 (Ark. 1959); *Woods* v. *City of Durham*, 158 S.E. 97 (N.C. 1931); *Stubbs* v. *United States*, 21 F. Supp. 1007 (M.D.N.C. 1938); *Doty* v. *American Telephone and Telegraph Co.*, 130 S.W. 1053 (Tenn. 1910); and *Whoreskey* v. *Old Colony R. Co.*, 53 N.E. 1004 (Mass. 1899).

Legislative policy favors the prompt settlement of property disputes. Adjacent property owners are entitled to reasonable bases for plans and development. The public is served by assurances of reasonable expectations as to public use. To suggest that a claim or dispute of property rights shall remain indefinitely in "limbo" is untenable. Basic rules of law applying to real property are designed to prevent that very problem. The constitutional right advanced by Alper is a property right, not a fundamental personal constitutional guarantee that is forever self-perpetuating. NRS 11.190(5)(b) is abundantly clear on its face, and should be validated unless it suffers from constitutional infirmity.

E. ARGUENDO, IF N.R.S. 11.190(5)(b) SHOULD BE CONSTRUED NOT TO APPLY, THEN N.R.S. 11.220 LIMITING RIGHTS OF ACTION TO FOUR YEARS IS APPLICABLE TO THE FACTS OF THIS ACTION.

Assuming, for purposes of argument only, that the one year statute does not apply, then N.R.S. 11.220 (often referred to as the "catch-all" statute of limitations) *must*

apply to bar Alper's action which Plaintiffs entered into more than five years after the commencement of construction on the widening of Flamingo Road.

The statute provides:

> "*An action for relief, not hereinbefore provided for,* must be commenced within 4 years after the cause of action shall have accrued." (Emphasis added)

In a fundamental holding of long standing, this Honorable Court held in *Nevada* v. *Yellow Jacket Silver Mining Company,* 14 Nev. 220 (1879):

> "Our statute of limitations embraces all characters of actions, both legal and equitable (White v. Sheldon, 4 Nev. 288.) And it may be added, that it embraces *every civil action,* both legal and equitable, whether brought by an individual or the state; and if the cause of action is not particularly specified elsewhere in the statute, it is embraced in section 1033, and the action must be commenced within four years after the cause of action accrued. Such is the plain reading of the statute and the evident intention of the legislature." (Emphasis added) At p. 230.

APPENDIX M

Excerpt From Appellants' Reply Brief

(pages 32 to 39)

Case No. 8412

In the Supreme Court of the State of Nevada

Arby W. Alper and Ruth Alper, Appellants vs. Clark County, Nevada, Respondent.

D. APPELLANTS' CLAIM FOR INVERSE CONDEMNATION IS NOT BARRED BY EITHER NRS 11.190(5) OR BY NRS 11.220.

Respondent CLARK COUNTY argues that if *NRS 244.245* is not held to apply to ALPER's claim, then *NRS 11.190(5)(b)*—the one year statute of limitations—or *NRS 11.220*—the four year "catch all" statute of limitations, bar the present action. This issue was resolved adversely to CLARK COUNTY by the District Court. (R/A 2126-2128, Conclusion of Law #8, R/A 2684)

Although this action was commenced on May 22, 1970 and an Amended and Supplemental Complaint filed July 31, 1972 (R/A 356-388) CLARK COUNTY failed to plead the Statute of Limitations in its Answer filed January 2, 1973 (R/A 491-497). Twenty-eight months later, on the eve of trial and after ALPER had incurred more than $25,000 in trial preparation, CLARK COUNTY first moved for leave to plead the Statute as a 6th Defense (R/A 1568-1584). The motion was extensively brief (R/A 1586-1603), argued, and denied by the Court (R/A 2126-2128).

Six days before the date fixed for trial, CLARK COUNTY moved for rehearing upon its denied motion, again seeking leave to amend to raise the bar of the Statute of Limitations (R/A 2177-2179). This motion was even more extensively briefed (R/A 2258-2296; R/A 2297-2319; R/A 2320-2336), orally argued, and again denied. The denial was not based upon the untimeliness of the motion (R/A 2128, l. 1-8) but upon the Court's conviction after considering extensive authority that general Statutes of Limitation like *NRS 11.190(5)* and *11.220* do not apply to claims in inverse condemnation, but that such actions may be brought at any time until the owner has lost title by adverse possession with all its incidents, including payment of taxes. (See Appellants' Opening Brief, pp 25-28) The reasons for the Court's refusal to permit amendment to state a Statute of Limitations defense were expressed by the Court in its Conclusion of Law No. 8 (R/A 2684) as follows:

> "8. That Chapter 11 of NRS (Statute of Limitations) does not bar an action for inverse condemnation and that Defendant COUNTY OF CLARK could only prevail on passage of time by complying with all of the requirements of adverse possession and that the Defendant COUNTY OF CLARK did not comply with all of said requirements."

CLARK COUNTY failed to cross-appeal from this adverse ruling, but nevertheless now seeks to support the Judgment on appeal on the theory that even if the District Court wrongly decided that *NRS 244.245* was applicable and constitutional, the Judgment was nevertheless correct in result because Appellant's claim for "just compensation" was barred by the Statute of Limitations. The Amicus Brief of MGM seeks to buttress this unarticulated thesis by citing cases at Page 35 to the effect that a correct

judgment will be affirmed even though decided on the wrong ground.

It is respectfully submitted that (i) CLARK COUNTY has no standing to raise the statute of limitations on appeal; and (ii) if it does, the District Court correctly ruled that *NRS 11.190(5)(b)* and *11.220* are inapplicable.

1. RESPONDENT CLARK COUNTY HAS NO STANDING TO RAISE A STATUTE OF LIMITATIONS DEFENSE ON APPEAL WHERE THE DISTRICT COURT REFUSED TO PERMIT AMENDMENT OF ITS ANSWER TO PLEAD SUCH DEFENSE AND RESPONDENT FAILED TO CROSS-APPEAL.

In *Dennis* v. *Caughlin*, 22 Nev. 447, 453, citing its own earlier decisions in *Maher* v. *Swift*, 14 Nev. 324, and *Moresi* v. *Swift*, 15 Nev. 215, and several California decisions, this Hon. Court stated:

> "It has frequently been decided that a party who has not appealed from a judgment cannot, on appeal by the opposite party, obtain a review of the rulings of the court against him. Our conclusion is that only such errors as the appellant complains of can be considered upon this appeal."

Although in the later case of *Leonard* v. *Bowler*, 72 Nev. 165 this Honorable Court indicated that "in a proper case and in the exercise of its discretion" the Court would "consider cross-assignments of error made by the respondent", and in *Alper* v. *Western Motels*, 84 Nev. 472, it corrected a minor error on cross-assignment *where Appellants did not object*, in *Alamo Irrigation Co.* v. *U.S.*, 81 Nev. 390 (1965) this Court re-affirmed the principle of *Dennis* v. *Caughlin*, supra, and declined to consider a respondent's cross-assignment of error, saying:

> "These objections are not properly before this court. Respondent did not cross-appeal, but filed a cross-assignment of error only as to the issue of laches. Generally errors affecting a party who does not appeal will not be reviewed (cites omitted) . . In this case we do not choose to review the objections of the respondent because they were not raised by a cross-appeal and will not now be considered by the court."

It is evident, therefore, that although this Honorable Court has discretion to consider a cross-assignment of error it will rarely undertake to do so. Since adoption of the Nevada Rules of Appellate Procedure in 1973, less reason exists than ever before for entertaining a cross-assignment of error, since Rule 4(a) now allows a respondent 14 days after the filing of a timely notice of appeal by appellant within which to cross-appeal.

In a factual context almost on all fours with that of the case at bar, a Federal Court, declined to review the bar of the statute of limitations, pressed by the Respondent in support of the summary judgment granted by the District Court, because Respondent had not cross-appealed on this issue. Thus, in *Tallman* v. *Udall* (CA DC 1963) 324 F.(2d) 411, reversed on other grounds (1965) 380 U.S. 85 S.Ct. 792; 13 L.Ed.(2d) 616, the defendant moved for summary judgment (1) on the merits, and (2) on the ground that the claim was barred by the statute of limitations. The District Court granted summary judgment on the merits, but expressly rejected the statute of limitations defense, just as Judge Thompson did in the instant case. The appellate court reversed. Although the opinion considered and rejected the statute of limitations defense, two of the three judges concurred to express the view that the limitations issue was not properly before the court because of the Respondent's failure to cross-appeal, saying:

> "It may seem anomalous at first blush that a successful litigant in the lower court should be under any necessity whatsoever of appealing from the decree which brought him victory. But the judgment may as here be comprised of several elements, adverse as well as favorable. If the prevailing party wishes to rely on appeal on a contention decided against him, he must preserve his rights by an appeal. This can be by a cross-appeal if time permits after his opponent has appealed, or it may be by a timely notice of appeal which can be dismissed if the other elects not to pursue the litigation further. In the absence of such a preservation of the point, the successful litigant must be taken to have regarded the grounds upon which he won as so strong that he is content to rely upon them alone in the appellate proceedings."

The view of the concurring judges was cited with approval in *United States ex rel Townsend* v. *Ogilview* (CA 7th, 1964) 334 F.(2d) 837, 842 cert denied (1965) 379 U.S. 984; 85 S.Ct. 683; 13 L.Ed.(2d) 574. See also *Wisconsin Bankers Assn* v. *Robertson* (CA DC 1961) 294 F. (2d) 714, cert denied (1961) 368 U.S. 938; 82 S.Ct. 381; 7 L.Ed. (2d) 383; and *Rhoads* v. *Ford Motor Co.* (CA 3d 1975) 514 F.(2d) 931, the latter stating that filing of a protective cross-appeal is the "better practice".

Even more significantly, the Statute of Limitations defense, like all affirmative defenses, is required under NRCP 8(c) to be affirmatively pleaded, and, when not so pleaded, such defenses are waived.

> *Chisholm* v. *Redfield*, (1959) 75 Nev. 502, 508 (statute of frauds)

Ray Motor Lodge, Inc. v. *Shatz,* (1964) 80 Nev. 144, 117, fn.2

Carter v. *Barabash,* (1966) 82 Nev. 289, 292

Marschall v. *City of Carson,* (1970) 86 Nev. 107, 111

Although the Nevada cases cited above all involved waiver of the Statute of Frauds through failure to plead the same as required by *NRCP 8(c) and 12(b),* the same rule has been universally applied in Nevada and elsewhere to failure to plead the Statute of Limitations.

Woodstock v. *Whitaker,* (1962) 62 Nev. 224

Barr v. *Petzhold,* (1954 Ariz) 273 P. (2d) 161

Hall v. *Chamberlain,* (1948 Cal) 192 P. (2d) 750

Sheeter v. *Lifur,* (1952 Cal.App.2d) 249 P. (2d) 336, 342

Rivera v. *Johnston,* (1951 Ida) 225 P. (2d) 858

Marks v. *McCune Construction Co.,* (1962 Okla) 370 P. (2d) 560, 562

Oklahoma City v. *Local Fed. Sav. & Loan,* (1943 Okla) 134 P. 2d 565

Chavez v. *Kitsch,* (1962 N.M.) 374 P. (2d) 497

Darling v. *Christensen,* (1941 Or) 109 P. (2d) 58

Boyle v. *Clark,* (1955 Wash) 287 P. (2d) 1006

It is also noteworthy that the doctrine of waiver through failure to plead the Statute of Limitations has been frequently applied to public bodies, sometimes in the context of condemnation proceedings.

Mitchell v. *County Sanitation Dist.,* (1957 Cal App) 309 P. (2d) 930

Keeter v. *Board of County Commissioners,* (1960 N.M.) 354 P. (2d) 135

Butte Country Club v. *Metropolitan San. Dist.,* (1974

Coray v. *Hom,* (1964) 80 Nev. 39, 41

Mont) 519 P. (2d) 408

So, in *Mitchell* v. *County Sanitation District,* supra, after reviewing the authorities, the California Court of Appeals said:

> "Suffice it to say that we understand the rule to be that the defense of the statute of limitations, even as to a public body, is waived unless the question or defense is raised by demurrer or answer." (309 P. (2d) 930, 933)

Furthermore, it has been held that when an affirmative defense like the statute of limitations is not pleaded, it may not be raised for the first time by exceptions to findings of fact and conclusions of law after rendition of judgment. (*Oklahoma City* v. *Local Federal Savings & Loan,* supra) And, it is generally agreed that when not pleaded below, the Statute of Limitations may not be raised or considered on appeal.

Marks v. *McCune Construction Co.,* supra

Sheeter v. *Lifur,* supra

Keeter v. *Board of County Commissioners,* supra

Had the District Court permitted CLARK COUNTY to amend and raise the defense of the Statute of Limitations, or had CLARK COUNTY cross-appealed from the adverse ruling on this point, it is conceivable that CLARK COUNTY could urge the Statute in support of the Judgment. But where CLARK COUNTY waived the Statute in the first instance by failing to plead it, and then failed to cross-appeal from the ruling denying it leave to plead the Statute as a defense, it lost whatever right it had to raise such defense in this action, either below or before this Court. The defense of Statute of Limitations is simply not part of this case. And since, on this state of the record, CLARK COUNTY could not have won below on the bar of the Statute—even if such defense would other-

wise have been proper—and since it did not cross-appeal the ruling denying it leave to amend, it seems self-evident that CLARK COUNTY may not now bootstrap itself to raise the waived defense by urging it in support of a judgment decided on different grounds.[10]

2. GENERAL LIMITATIONS STATUTES LIKE NRS 11.190(5) AND NRS 11.220, DO NOT APPLY TO INVERSE CONDEMNATION SUITS, WHICH MAY BE BROUGHT AT ANY TIME UNTIL THE OWNER'S TITLE HAS BEEN LOST THROUGH ADVERSE POSSESSION BY THE CONDEMNOR, INCLUDING ALL THE INCIDENTS OF ADVERSE POSSESSION SUCH AS PAYMENT OF TAXES.

Turning now to the merits, CLARK COUNTY argues that if *NRS 244.245* is not held to apply to ALPER's claim, or is held unconstitutional as applied to ALPER's claim, then *NRS 11.190(5)(b)*, the one year statute of limitations; or *NRS 11.220*, the four year catch-all statute of limitations bars the present action. As noted above, the issue was raised in District Court by CLARK COUNTY in its motion for leave to file a Sixth Defense asserting the statute of limitations as a bar to ALPER's claim. District Judge Thompson denied the motion because, as a matter of law, in the absence of a special statute of limitations in Nevada applicable to inverse condemnation actions as such, general limitation statutes like those found in NRS Chapter 11, do not apply

10. Nor is CLARK COUNTY aided by the fact that it sought to raise the defense in the lower court by amendment, and that its motion was denied. In *Alamo Irrigation Co.*, supra, the respondent similarly raised certain objections before the lower court and was overruled, but since respondent did not cross-appeal, this Court refused to consider its cross-assignments of error.

to suits in inverse condemnation, which are regarded as *sui generis*, neither "actions at law" or "suits in equity" but "special proceedings".

Oklahoma City v. *Wells*, supra, at 1082-1083

Aylmore v. *City of Seattle*, (1918 Wash) 171 P. 65

Salt Lake Inv. Co. v. *Oregon Short Line R. Co.*, (1914 Utah) 148 P. 439

Faulk v. *Missouri River & N.W. R. Co.*, (1911 S.D.) 132 N.W. 233

Nichols on Eminent Domain, Sec. 4.102.5

In fact, the better and majority view is that, in the absence of special statutes of limitations expressly applicable by their terms to inverse condemnation actions, suits in inverse condemnation may be brought at any time until the owner has lost title to the land taken through adverse possession by the condemnor for the statutory period. See *Aylmore* v. *City of Seattle*, supra, and other cases cited at page 26 of Appellants' Opening Brief.

Moreover, it is universally held that it is not the mere passage of time which divests the owner of his right to seek "just compensation" but loss of title to his land through actual adverse holding by the condemnor for the statutory period together with all the usual incidents of adverse-possession, such as the requirements that it be hostile, under good faith claim of right or color of title that it be open and notorious, and accompanied by payment of taxes. Such requirements are held to apply as fully where the adverse possessor is a public body as when it is a private individual.

Hamilton v. *McCall* (1965 Ida) 409 P. (2d) 393

State Road Commission v. *Cox Corp.* (1973 Utah) 506 P. (2d) 54

See Page 27 of Appellants' Opening Brief for other cases.[11]

Of course, if the County desired to obtain title to ALPER's land by adverse possession, it could have dispensed with the requirement for payment of taxes by ceasing to levy them. *City of Gilroy* v. *Kell* (1924 Cal) 228 P. 400. But, as the District Court found[12] CLARK COUNTY has continued to levy and collect taxes on the Alper land to the present time. Consequently, by levying taxes, CLARK COUNTY recognized Alper's title and its holding was not adverse to his title and CLARK COUNTY therefore could never acquire title by adverse possession so as to bar Alper from asserting his claim for "just compensation".

Hamilton v. *McCall*, supra

State Road Commission v. *Cox Corp.*, supra

See also *People's Water Co.* v. *Boromea* (1916) Cal. App) 160 P. 574

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In fact, under one respectable line of authority, stemming from the U.S. Supreme Court, a public body may never acquire title—notwithstanding entry and possession—until just compensation is determined and paid.

Kennedy v. *Indianapolis*, 103 U.S. 599; 26 L.Ed 550

Cherokee Nation v. *Southern Kan.Ry.Co.* (1890) 135 U.S. 641

So, in *Cherokee Nation*, the rule was stated as follows:

". . . by the terms of the act of congress, the title to the property appropriated passed from the owner

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11. The law as summarized in the preceding paragraphs was clearly adopted by the District Court. (See R/A 1967, 1.27 to 1968, 1.24; R/A 2622, 1.8-29; Conclusion of Law No. 8, R/A 2684)

12. See R/A 1998, 1.3-23; R/A 2000, 1.3-16.

to the defendant, when the latter, having made the required deposit in court, is authorized to enter upon the land pending the appeal, and to proceed in the construction of its road. *But clearly the title does not pass until compensation is actually made to the owner; within the meaning of the constitution the property, although entered upon pending the appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner.* Such was the decision in Kennedy v. Indianapolis, 103 U.S. 599, 604, where the court construed a clause of the constitution of Indiana declaring that no man's property 'shall be taken or applied to public use * * * without a just compensation being made therefor,—substantially the provision found in the national constitution. This court there said that, *'on principle and authority, the rule is, under such a constitution as that of Indiana, that the right to enter on and use the proporty is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent until just compensation has been made to him.'"* (emphasis supplied) 135 U.S. at 660

So, since the property "is not *taken* until compensation is ascertained in some legal mode, and, being paid, the title passes from the owner," it is arguable that—at least absent a special statute of limitations applicable specifically to inverse condemnation claims—Alper's property has never been *"taken"* so as to start a statute of limitations running. Or, put in another way:

"It has been held that where the constitution, either expressly or as interpreted by the courts, requires compensation to be first made for property taken for public use, *a law which casts the initiative*

> *upon the owner and requires him to prosecute his claim for compensation within a time limited, or be barred, is invalid,* and that when, under such a constitution, property is appropriated to public use without complying therewith, the owner may (although laches may estop him from recovering possession) maintain an action for compensation at any time before he has lost title by the appropriator's adverse possession. (emphasis supplied) *27 Am.Jur. (2d) Eminent Domain, Sec. 498*

However, to reach the same result, we need not go as far as the Supreme Court did in *Cherokee Nation,* or as far as the authorities which hold that a constitutional claim for compensation *may not be barred by any statute of limitations.* We need only point out that in Nevada there is no specific statute of limitations applicable to inverse condemnation claims, that under the authorities above cited, general statutes of limitation like those set forth in Chapter 11 NRS do not apply to claims in inverse condemnation, and that CLARK COUNTY has not —and cannot—extinguish Alper's claim for "just compensation" through adverse possession for two equally cogent reasons:

> *First,* because CLARK COUNTY is still assessing, and ALPER is still paying taxes on the property. (R/A 1990, 1.3-23; R/A 2000, 1.3-10)
>
> *Second,* because as the District Court found, CLARK COUNTY is estopped from ever claiming a prescriptive title against ALPER by virtue of the Bartley letter, P's Exh. 28, quoted at pp 6-7 of Appellants' Opening Brief. (R/A 1970, 1.24-27; R/A 1984, 1.13-18; R/A 2646, 1.24-28)

CLARK COUNTY cites authorities that have applied statutes of limitations to inverse condemnation actions under certain circumstances.[13] One line of authorities on which CLARK COUNTY relies involve cases in which the statute gives the landowner a specified period of time *after notice of a condemnation order* to bring his claim for compensation.

> *Hot Springs County* v. *Fowler* (1959 Ark) 320 S.W. (2d) 269
>
> *Arkansas State Highway Commission* v. *O.T. Montgomery* (1964 Ark) 376 S.W. (2d) 662
>
> *Whoreskey* v. *Old Colony R. Co.* (1899 Mass) 53 N.E. 1004

However, we have no comparable statute in Nevada (R/A 1951, 1.16-19), and if we had, it would surely be inapplicable to an inverse condemnation claim which arises because the condemning authority failed to follow the statutory condemnation proceeding. For here, there was *neither a condemnation order nor a condemnation proceeding.* The cases cited are therefore inapposite.

The other cases cited by CLARK COUNTY involve special statutes of limitation where there has been a taking for public use without a condemnation proceeding or order and the statute expressly allows the property owner to sue for "just compensation" within a specified period of time after the taking.

> *Stubbs* v. *United States* (1938 DC NC) 21 F.Supp 1007 (Tucker Act case)

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13. We are completely at a loss to understand why CLARK COUNTY has cited *Wilson* v. *Beville,* supra, to this point, since, as already noted, *Beville* is strong authority that compliance with claims statutes is not required in inverse condemnation proceedings.

Woods v. *City of Durham* (1931 NC) 158 S.E. 97

Doty v. *American Telephone & Telegraph Co.* (1910 Tenn) 130 S.W. 1053

Trippe v. *Port of New York* (1964 NY) 249 N.Y.S. (2d) 409

However, as we have already noted, in Nevada we have no special statute of limitations for inverse condemnation suits. And, in the absence of such special statutes, the general statutes of limitation like *NRS 11.190(5)(b)* and *NRS 11.220* are held inapplicable.

Oklahoma City v. *Wells* (1939 Okla) 91 P. (2d) 1077; 123 A.L.R. 662; and Annotation at 123 A.L.R. 676

See particularly cases cited at *123 A.L.R. 679 to 683.*

Furthermore, to cite *NRS 11.190(5)(b)* as a bar to this action is to beg the question. For whether *NRS 11.190(5)(b)*—requiring claims and actions against counties and other public bodies "which have been rejected" to be brought within one year "after the first rejection thereof" —is clearly dependent upon whether it was necessary to present such a claim to CLARK COUNTY in the first place by virtue of *NRS 244.245*. If compliance with *NRS 244.245* was unnecessary for the reasons Appellants have assigned, then *NRS 11.190(5)(b)* would be inapplicable by its own terms, since there would have been no claim presentation and no rejection of the same. On the other hand, if *NRS 244.245* is a bar, then ALPER being already precluded from suit by non-compliance with a condition precedent, the bar of *NRS 11.190(5)(b)* becomes moot.

In support of its contention that *NRS 11.220* (the 4 year "catch-all") statute bars ALPER's claim CLARK COUNTY cites the early decision of this Court in *Nevada* v. *Yellow Jacket Silver Mining Company* (1879) 14 Nev.

220. In *Yellow Jacket*, the Supreme Court held that C.L. 1033 (the predecessor of *NRS 11.220*) applies to "every civil action, both legal and equitable". However, in *Yellow Jacket*, the Court was not determining the applicability of the "catch-all" statute of limitations in a suit for constitutional compensation under the self-executing provisions of the State Constitution, but only to an action by the State of Nevada under its general revenue laws. Moreover, we need hardly again reiterate that an inverse condemnation suit is neither a "legal action" nor an "equitable action", but rather a "special proceeding" to which the "catch-all" limitation statutes have been held to have no application.

Oklahoma City v. *Wells*, supra

Harley v. *Keokuk & N.W. R. Co.* (1892 Ia) 52 N.W. 352

Salt Lake Invest. Co. v. *Oregon Short Line R. Co.*, supra

So, when the Nevada Supreme Court, almost 100 years ago, spoke of the "catch-all" statute of limitations as being applicable to "every civil action, both legal and equitable", it is evident that it was not considering the effect of such a statute upon a suit brought under the self-executing provisions of the Nevada Constitution which require that "just compensation" be *first paid* before private property is taken for public use. For these reasons, *Yellow Jacket* is inapposite.

Under the above authorities, ALPER respectfully submits that the District Court correctly found that neither *NRS 11.190(5)(b)* nor *NRS 11.220* are applicable in a suit for inverse condemnation, and that CLARK COUNTY has not obtained title to Alper's land by adverse possession and is estopped from doing so by its action in continuing to assess taxes and by ALPER's reliance on the Bartley letter.

Should this Honorable Court hold *NRS 11.220* applicable, this would by no means necessitate affirmance of the Judgment below, which was rendered *sua sponte*, without motion for summary judgment or evidentiary hearing. Such a ruling by this Court would merely open a number of other questions for determination upon their facts and the applicable law. For, even if we assume that *NRS 11.220*, the 4 year catch-all statute applies, and even if we grant that CLARK COUNTY commenced construction of Flamingo Road over ALPER's land on May 8, 1967 —since this action was commenced on May 22, 1970 (R/A 1), on its face it would appear that this action was commenced well within such four year period.

The four year catch-all statute only becomes significant, therefore, because the District Court held in its Finding of Fact No. 5 (R/A 2682) that ALPER only became a party to this proceeding on July 31, 1972 when the Amended and Supplemental Complaint was filed, and that such pleading does not relate back to May 22, 1970 when ALPER's predecessor, Ross, filed this action, because the original Complaint filed by Ross was a nullity. In reaching this startling conclusion, the District Court reasoned that because the Federal Court in Case No. 1320 had found that the conveyance from ALPER to Ross was "feigned and sham" for the purpose of conferring diversity jurisdiction upon the Federal Court, at the time Ross commenced this action, ALPER was the "real party in interest" and the Complaint filed by Ross was *nudum pactum*.

Although ALPER sought and was granted a rehearing upon this question, which was thoroughly briefed (R/A 2320-2336), the District Court found it unnecessary to rehear and decide this question because of its ruling that the action was barred by *NRS 244.245*. So, the tentative

finding stands, although Alper respectfully submits that it is palpably erroneous.

6 Wright & Miller, Federal Practice and Procedure, #1557

Kramer v. *Caribbean Mills, Inc.* (1969) 394 U.S. 823; 89 S.Ct. 1487

Castleman v. *Redford* (1942) 69 Nev. 259; 124 P. (2d) 293

Withers v. *Rockland Mines Co.* (1937) 58 Nev. 98; 71 P. (2d) 156

Carpenter v. *Johnson*, 1 Nev. 331, 332

Ray v. *Hawkins* (1960) 76 Nev. 164; 350 P. (2d) 998 (holding that the party who holds legal title is the "real party in interest and has standing to sue")

Moreover, Finding of Fact No. 5 disregards the fact that ALPER was *added* as a party plaintiff on May 5, 1971 *by stipulation and order* (R/A 1617, 1619) and that under *NRCP 17(a)* ALPER's joinder had "the same effect as if the action had been commenced in the name of the real party in interest" so that by virtue of *NRCP 17(a)* and *NRCP 15(c)* there would be a relation back.

Janis v. *Kansas Electric Power Co.* (1951 USDC Kans) 99 F.Supp. 88

Wallis v. *United States* (1952 USDC) 102 F.Supp. 211

Finding of Fact No. 5 also disregards the fact that CLARK COUNTY had notice of the general nature of the claim made by Ross and ALPER (as the "real party in interest"), and of the transaction from which it arose, from the Complaint in Case No. 1320, the Complaint herein, the Amended and Supplemental Complaint filed herein on August 23, 1971 (R/A 156-187) (which was ordered stricken on a

procedural point) as well as from the Amended and Supplemental Complaint filed July 31, 1972 (R/A 356-388). Since CLARK COUNTY had fair notice throughout of the general nature of the claims being asserted so that it could prepare to defend against them, it is generally held that the relation back doctrine of *NRCP 15*(c) will be applied and there is no reason to bar the claim through operation of the intervening bar of the statute of limitations.

Kreiger v. *Village of Carpentersville* (1972 Ill) 289 N.W. (2d) 481

Tobias v. *Kessler* (1963) 239 N.Y.S. (2d) 554, 556

Compare *Rogers* v. *State* (1969) 85 Nev. 361, 365

Here again, if this Honorable Court agrees with ALPER's analysis and holds Finding of Fact No. 5 to be erroneous, *NRS 11.220* becomes moot, for the action was clearly commenced within 4 years from the time CLARK COUNTY started to build Flamingo Road over ALPER's property. However, if this Honorable Court disagrees, that does not necessarily end the matter. For we are then faced with a number of perplexing questions, some of which could only be resolved upon an evidentiary hearing:

1. Where the County entered under a purported "52 year easement" from ALPER's lessee, was its holding in subordination to ALPER's rights so that its entry was not a "taking" until the lease was terminated on January 16, 1969?

Gentleman v. *Soule* (1963, Ill) 83 Am.Dec. 264

Newhoff v. *Mayo*, 48 N.J.Eq. 619; 23 A. 265

Automotive Products Corp. v. *Provo* (1972 Utah) 502 P. (2d) 568

2 Thompson on Real Property, Easements, Sec. 317 at pp 26 and 28

Reno Brewing Co. v. *Packard* (1909) 31 Nev. 433

McDonald v. *Fox* (1889) 20 Nev. 364, 368

City of Des Plaines v. *Boeckenhauer* (1943 Ill) 50 N.E. (2d) 479, 482

2. For the same reasons, did ALPER have the right to assume that CLARK COUNTY had not "taken" his land until it was brought home to him in July 1969 that, despite the assurances contained in the Bartley letter of June 1968 (P's Exh. 28), CLARK COUNTY had entered into an agreement with Jacobson and Bonanza No. 2 to resist ALPER's claims to his land? (R/A 383-388)

3. If so, did the "taking" which started the statute of limitations running occur when the lease under which the County entered terminate on January 16, 1969, or when ALPER first became aware of CLARK COUNTY's intent to permanently appropriate his land?

4. Where ALPER, though the owner, was out of possession at the time of the taking because he had leased the property for a term of years, was his action for "just compensation" under the Constitution postponed until he regained possession of the property?

Rhoda v. *Alameda County* (1933 Cal.App.) 26 P. (2d) 691, 694

Potrero Nuevo Land Co. v. *All Persons* (1916) 29 Cal.App. 743; 156 P. 876

Thompson v. *Pacific Electric R. Co.* (1928) 203 Cal. 578; 265 P. 220

Stephenson v. *Cavendish* (W.Va.) 59 S.E.(2d) 459; 19 A.L.R. (2d) 720

Mosesian v. *Fresno County* (1972 CA 2d) 104 Cal. Rptr. 655

5. Where the leased land, including the portion in the physical possession of CLARK COUNTY, was legally in the possession of the Bankruptcy Court, and ALPER was precluded from regaining possession by a Bankruptcy Stay Order, since "just compensation" is the constitutional equivalent of the land, was operation of any Statute of Limitations for recovery of "just compensation" tolled by virtue of *11 U.S.C.A. 791 and NRS 11.350*?

St. Paul, M & M. Ry. Co. v. *Olson* (1902 Minn) 91 N.W. 294

Fortunately, we do not believe it will be necessary for the Court to reach these questions, or to remand the cause for their further adjudication below, because under the authorities cited, it seems quite clear that (1) CLARK COUNTY has no standing to raise the statute of limitations question upon this appeal; and (2) in any event, since the general statutes of limitations set forth in NRS Chapter 11 are inapplicable to a suit in inverse condemnation, such action is not barred unless and until the owner loses title through adverse possession.

CONCLUSION

ALPER respectfully submits that his action to recover "just compensation" for valuable property of which he remains the record owner, and upon which he is being taxed, but of the use of which he has been deprived by a taking for public use, is not barred by *NRS 244.245*

or, if so barred, that *NRS 244.245* deprives ALPER of equal protection of the laws in violation of the State and Federal Constitutions, and that this Honorable Court should so declare.

Respectfully submitted,

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